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No. 85-268 (3)

In The
Supreme Court of the United States
October Term, 1985

Mitsui & Company (USA), Inc.; Mitsui Bussan Kabushiki Kaisha; VSL Corporation, Inc; Shinko Wire Co., Ltd. and Losinger AG,

Petitioners,

v.

Western Concrete Structures Co., Inc.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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I.

QUESTIONS PRESENTED

Petitioner has framed the questions presented in the petition (Petition p. i) academically and overly broad in terms of premises which are not part of the record in this case. Consequently, respondents have reframed those questions to be more consistent with the record in *this* case.

The questions which should be presented by the petition are:

1. Whether the Court of Appeals erred in holding that a viable cause of action under Section 1 of the Sherman Act is stated when the complaint alleges the factual bases of conspiratorial predatory conduct by each and all of the defendants to restrain trade in the post-tensioning industry, by conspiring and importing steel strand from Japan through subterfuge and fraud at prices lawfully unavailable to the competitors of the conspirator post-tensioner defendant, so that the post-tensioner defendant could and did underbid its competitors, including plaintiff, and could and did exclude those competitors.

2. Whether the Court of Appeals erred in holding that plaintiff stated causes of action under Section 2 of the Sherman Act, by alleging that the defendants agreed that the defendant suppliers of post-tensioning steel strand would sell strand to the post-tensioner defendant through conspiracy and subterfuge at a price legally unavailable to competitors of that defendant so that the post-tensioning defendant could and did monopolize the post-tensioning market.

Respondent believes that the above questions should be answered in the negative and that they present no question upon which certiorari should be granted.

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II.

SUPPLEMENTAL STATEMENT OF THE CASE

Petitioner's statement of the case is in most respects accurate but does contain meaningful omissions or inaccuracies based upon misinterpretation, misreading or misstatement of the facts of the case and the lower court's decisions. Some of the omissions are apparently due to defendants' myopic and academic disregard of the factual allegations of the complaint.

Contrary to defendants' statement of the case (Pet. p. 2),* the crux of the plaintiff's case as alleged in its complaint is *not* the conversion of dumping charges in violation of the 1921 dumping act into antitrust violations. The crux of plaintiff's case *is* that the defendants conspired to injure the competitors of one of the conspiring defendants (VSL), who was a post-tensioning competitor of plaintiff, and attempted to monopolize the post-tension-

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*The following abbreviations will be used throughout this brief:

Pet.: The Petition for Writ of Certiorari;

App.: The Appendix A to the Petition for Writ of Certiorari;

Court of Appeals: United States Court of Appeals for the Ninth Circuit;

District Court: United States District Court for the Northern District of California;

VSL: VSL Corporation, Inc., a California corporation;

Mitsui: Mitsui & Company (USA), Inc., a New York corporation;

Shinko: Shinko Wire Co., Ltd., a Japanese corporation;

Losinger: Losinger AG, the Swiss corporate parent of VSL; and

Western: Western Concrete Structures Co., Inc., a California corporation.

ing business. This was done by providing, through conspiracy, subterfuge and fraud, the post-tensioning strand to the post-tensioner defendant VSL at prices lawfully unavailable to competitors of VSL, including plaintiff. As set out in the Court of Appeals decision (App. p. 2) the price of steel strand significantly affects a post-tensioning firm's competitive bidding position. The conspiratorial actions of the defendants were successful in injuring and excluding the competitors of VSL and resulted in VSL obtaining a monopolistic position in the post-tensioning industry.

It is not true as stated at Pet. p. 3, ¶ 3 that plaintiff Western "conceded that each sale in the chain was above the seller's average cost and thus was fully profitable to each defendant." What plaintiff did admit is quite different and is more accurately characterized by the Court of Appeals at the reference given by defendants (App. p. 3). The plaintiff did disclaim that it alleges that the post-tensioning strand sold by the supplier defendants Shinko-Mitsui-MBK was below cost or variable cost to Shinko. There was never an admission that *all* defendants did not sell below cost. Particularly the lack of below cost pricing allegations did not apply to VSL's sale or bid price as to which plaintiff has not yet been able to conduct discovery. The statement in defendants' petition (Pet. p. 6), coupled with the footnote, is carefully couched to reverse the coin and say that plaintiff admitted that all prices were profitable to all defendants—*this is not so.*

From declination by plaintiff to allege below cost pricing between the defendant suppliers and defendant VSL, defendants have made wide excursions to the effect that all defendants profited, which was never admitted. After an improper statement of plaintiff's position, de-

fendants have attempted to reduce that statement to a definitional discussion of predatory pricing in what should be a futile attempt to engage the attention of this Court.

This case was decided only on the pleadings—no discovery has been conducted. No answer has been filed. No trial has been had.

III.

SUMMARY OF ARGUMENT

The petition for writ of certiorari should be denied. There are no special and important reasons for review by this Court; the Court of Appeals in this case did not render a decision in conflict with the decision of another federal court of appeals. There is also no decision on a federal question which is in conflict with any applicable decisions of this Court. (Rules of the Supreme Court of the U.S., Rule 17.)

Throughout their petition, defendants have ignored the facts of plaintiff's complaint and have set up academic straw-men. This is *not* a case which attempts to define predatory pricing to which the defendants constantly allude. The defendants attempt to focus on this factor while ignoring the factual thrust of plaintiff's complaint and the application of those facts to a motion to dismiss which was decided by the Court of Appeals.

As succinctly stated by the Court of Appeals, the complaint alleged the essential elements of a Sherman Act, Section 1 violation (15 U.S.C. § 1) in that the complaint clearly alleged (1) a *conspiracy* between each and all of the defendants; (2) that the conspiracy was *in restraint of trade or commerce;* and (3) that the *object and intent*

of the conspiracy was "*to injure VSL's competitors and drive them out of the market;*" and (4) that the *object was successful.* (App. pp. 5, 6.)

The plaintiff has consistently maintained that the defendants had conspired to engage in predatory *conduct.* The defendants have consistently taken the position that inasmuch as *one* element of that predatory conduct was to violate what they term a protectionist statute that such violation is procompetitive. Even assuming *arguendo* that the government regulation circumvented by the defendants is, in the abstract "protectionist", it is a quantum and illogical leap to classify as immune from antitrust scrutiny a course of *predatory conduct* which includes an act of circumvention of the protectionist statute. The course of activities engaged in by defendants was intended to and did result in a restraint of trade and in particular, suppression, exclusion and injury to VSL's competitors in the post-tensioning business, including the plaintiff Western.

Moreover, the Court of Appeals found that Western's allegations adequately show the necessary anticompetitive or predatory conduct which is essential to its three claims under Section 2 of the Sherman Act (15 U.S.C. § 2) for attempt to monopolize, monopolization and conspiracy to monopolize. (App. pp. 7, 8.) Western adequately alleged exclusionary conduct unaccompanied by a legitimate competitive effect or motive. Such conduct pursuant to the conspiracy engaged in by the supplier defendants included providing to the conspirator post-tensioner defendant, VSL, steel strand at a price below the price that any competitor of VSL could lawfully obtain such steel strand and VSL's underbidding of its competitors. VSL's resultant ability to underbid its competitors was not based

in any way upon an enhancement of the quality or attractiveness of the services provided by VSL, nor was it in response to legitimate competitive market pressures, nor did it alter the demand function that all competitors confront nor was it based upon business acumen. Rather, the sole purpose of the conduct was to discipline or eliminate competition so as to later provide VSL benefits derived from exclusion of its competitors. This naturally exclusionary conduct, not based upon any particular efficiencies or a superior product, resulted in VSL obtaining a monopoly position. Such conduct is precisely that intended to be proscribed by Section 2 of the Sherman Act and is recognized in all the circuits as illegal conduct.

No conflict in the circuits exists with respect to the instant decision.

IV.

ARGUMENT

1. THE COURT OF APPEALS' DECISION IS NOT CONTRARY TO THIS COURT'S DECISIONS

In Section I-A of their petition, the defendants have again totally ignored the factual thrust of plaintiff's complaint of which the Court of Appeals took cognizance. Thus, at Pet. p. 6, ¶ 2, defendants state that plaintiff alleges that "VSL and Mitsui engaged in purchase and sales transactions in steel strand at prices that 'violated' the 1921 Antidumping Act and the Trigger Price Mechanism." That statement should be compared, as the Court of Appeals did in its decision at App. pp. 5, 6, to the actual allegations of the complaint (¶¶ 41-46) (App. pp. 34-36). Paragraph 41 reads as follows (App. p. 34):

> At least as early as January 1, 1978 . . . and continuously thereafter up to about June of 1981 within the Northern District of California and elsewhere defendants Mitsui (Japan), Mitsui (USA), Shinko, Losinger and VSL through their officers and agents . . . did unlawfully, knowingly and willfully conspire, combine and agree together, with each other, and with diverse other persons both known and unknown to plaintiff to enter into conspiratorial agreements, (as set out more particularly in preceding paragraphs 27 and 32 and in paragraph 42 hereinafter) which were intended to harm or unreasonable restrain competition, (as set out more particularly in preceding paragraphs 33, 34 and 35 and in paragraphs 43-45 hereinafter) which actually caused injury to competition, including plaintiff, (as set out more particularly in preceding paragraph 28, and paragraphs 46 and 47 hereinafter) in violation of 15 U.S.C. § 1 and § 15.

The second paragraph of that section of defendants' petition (Pet. p. 4) has been discussed. It states that plaintiff "declined to plead that the low prices of which it (plaintiff) complained were below any measure of cost. It is true that plaintiff stated that it *would not attempt* to prove the price versus cost to Shinko—the practicalities so dictated. For a private person or small company to launch upon discovery to prove such an allegation would be prohibitively expensive. But *this is not the crux* nor even an essential element of plaintiff's case as alleged. The necessary allegations with respect to Sherman Act, Section 1 are as set out above.

Defendants' application of their trilogy of cases including the case of *United States v. Citizen & Southern National Bank*, 422 U.S. 86 (1975) cited in their Section 1A (Pet. p. 9) is so strained as not to be relevant to the facts of this case. The Court of Appeals correctly distinguished this case in its decision (App. p. 8) wherein it stated:

The third case is *United States v. Citizens & Southern National Bank*, 422 U.S. 86 (1975). The facts there are so different from the facts here that the case is hardly relevant. Moreover, it was not a pleading case. The court did not suggest, much less say, that a conspiracy to circumvent anti-competitive government restrictions, to the damage of competitors, can never be a violation of Section 1 of the Sherman Act.

2. THE COURT OF APPEAL'S DECISION CONCERNING SHERMAN SECTION 1 DOES NOT CONFLICT WITH OTHER LOWER COURT AUTHORITIES WHEN THE FACTS OF THOSE CASES ARE CONSIDERED

The three circuit court decisions relied upon by petitioners are not, after properly reviewing their factual settings and holdings, in conflict with the Ninth Circuit decision in the instant case. Rather, petitioners attempt, by stretching the facts and conclusions of those cases and conveniently ignoring other important facts and holdings which clearly distinguish those cases, to support a non-existent conflict in the circuits. The Court of Appeals analyzed the cases cited by defendants and distinguished each of them in its decision at App. p. 6, 7, 8.

A brief review of each of those cases establishes the fallacy of petitioners' position.

1. *Zenith. Zenith case* [*In re Japanese Electronic Products Antitrust Litigation*, 723 F.2d 238 (3d Cir. 1983), *cert. granted*, 105 S.Ct. 1863 (1985)] has a factual situation so far removed from the instant case as to be nearly meaningless. Moreover, to the extent that it is similar, it supports the plaintiff's position.

In *Zenith*, American television manufacturers brought an action against Japanese television *manufacturers* and

their importer/distributor subsidiaries and also included one American retailer, Sears. Plaintiffs alleged "a conspiracy to drive all American manufacturers of television receivers out of business by a 'scheme to raise, fix and maintain artificially high prices for television receivers sold by defendants in Japan and, at the same time, to fix and maintain low prices for television receivers exported to and sold in the United States." *In re Japanese Electronics Products*, 723 F.2d 238, 251 (3d Cir. 1983). Additionally, the *Zenith* plaintiffs charged that the pricing activities of defendants violated the 1916 Antidumping Act. *Id.*

In the instant case, the factual situation is quite different. The conspiracy alleged is vertical between Mitsui (Japan)/Shinko/Mitsui (USA) and VSL/Losinger to provide to VSL steel strand at prices legally unavailable to its competitors with the intent to allow VSL to exclude its competitors from the marketplace. One of these competitors is Western. Western is not situated in the same position as the plaintiffs in the *Zenith* cases. Unlike the *Zenith* plaintiffs, Western is not a competitor of the manufacturers but rather of the customer, VSL. Moreover, in *Zenith*, Sears was not situated in the same place as plaintiffs' competitors; namely the manufacturers. Thus, the conspiracy alleged which was to have involved Sears also was a conspiracy directed at ousting other manufacturers, not Sears' competitors. This issue was *never* raised. Moreover, the facts of the case indicate that there were a substantial number of "preferred" customers of the Japanese defendant manufacturers making it highly improbable that competition as a whole on Sears' level would be affected as it was in the instant case.

The district court in *Zenith,* after extensive discovery and accumulation of a massive record, granted defendants' motion for summary judgment finding the essential elements of this horizontal conspiracy not present. *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.,* 513 F.Supp. 1100, 1333 (E.D. Pa. 1981). This is contrary to the facts of conspiracy in this case.

In affirming the dismissal with respect to the peripheral defendant Sears, the Third Circuit did not, as appellees have stated, rely on the asserted "procompetitive" conduct of the defendants in circumventing the dumping laws, but rather indicated that *there was no independent evidence connecting Sears to the alleged conspiracy. See In re Japanese Electronic Products,* 723 F.2d at 313. It was not an issue before the court that such conspiracy affected Sears' competitors on a vertical level. Consequently, the issue is not even addressed by the Third Circuit. Specifically, the Third Circuit concluded that Sears' covering up of secret rebates did not give rise to an inference that it was involved in the alleged home market or export conspiracy. *Id.* at 312.

To the extent that the factually distinguishable *Zenith* decisions are relevant to the instant case, they show that a conspiracy including dumping activities combined with an attempt to force out competitors on *some level can* constitute antitrust violations. *As such they support rather than defeat appellant's position.* Moreover, the *Zenith* appeal decision emphasizes the importance of analyzing each case in light of its own facts. Doing so here emphasizes the inappropriateness of claiming a conflict between the Third Circuit and the Court of Appeals regarding the *Zenith* decision and the instant case.

2. *Knuth. Knuth II* [*Knuth v. Erie-Crawford Dairy Cooperative Ass'n,* 463 F.2d 470 (3d Cir. 1972)] cited by appellees as one of the cases in their "trilogy" is the second of two appeals in the same Third Circuit case. In *Knuth I* [*Knuth v. Erie-Crawford Dairy Cooperative Ass'n,* 395 F.2d 420 (3d Cir. 1968)], a dismissal of the complaint was reversed and the case remanded. In *Knuth II,* the court granted defendants' motion for a directed verdict with respect to the antitrust claim. This order was upheld by the appeal court.

The Court of Appeals recognized that *Knuth* is no precedent for the present case (App. p. 7). The only commonality of facts to this case is the breach of a regulation or statute. The orientation of the parties is inapposite to the present case. In *Knuth,* three hundred milk producers (i.e. dairy farmers), members of a cooperative, were plaintiffs against their own co-op as defendant and the dairies (processors) who were the customers of the co-op. In *Knuth,* the court simply found that no evidence of a conspiracy existed and specifically that the various dairies did not know that the other dairies were getting similar discounts nor was their action concerted in any way.

This case is clearly factually distinguishable from the instant case where the plaintiff Western is the distributor just like the dairies were. Moreover, various dairies were getting the advantages, whereas in the instant situation, only Western's competitor VSL was getting the unlawful price break. Therefore, again this case does not raise a conflict in the circuits but merely stands for the proposition that no evidence of a conspiracy was shown.

3. *Sutliff.* In *Sutliff, Inc. v. Donovan Companies, Inc.*, 727 F.2d 648 (7th Cir. 1984), the court dismissed a Sherman Act claim primarily based upon a finding that the requisite proof of injury to competition had not been shown by the acts of the defendants. The court stated in this regard:

> To injure, even to cripple or destroy, one or two competitors in a market will not, if there are many competitors in that market, have much if any effect on consumers or anyone else besides the competitors in question. But that is the only type of injury alleged in this case. The complaint alleges no competitive injury in the antitrust sense; defines no market; refers to no market-wide anticompetitive effects, actual or probable. So far as appears from the complaint there are many wholesalers of oil serving Appleton, and if so then weakening or even dstroying Ellingsen and Land-O-Lakes might have no effect on the market for oil as distinct from the prosperity of two sellers.

Id. at 655.

However, this is certainly not the instant case where Western's second amended complaint alleges competitive injury in the antitrust sense, defines the market and specifically refers to marketwide anticompetitive effects, probable and actual, as a result of the activities of the conspirators.

Again, this case establishes no conflict between the circuits but merely stands for the proposition that under the facts of *Sutliff* the necessary allegations had not been made for an antitrust violation. Such is not the case here, and from review of the *Sutliff* decision it seems clear that if the Seventh Circuit had been confronted with the allegations in the instant case, it would have found them sufficient.

Consequently, from review of the three claimed conflicting decisions, it is apparent that based upon their facts they are all distinguishable from the instant case and do not stand for a true conflict in the application of the law to the facts. Rather, they stand for the conclusion that where no evidence of conspiracy is shown, dismissal of antitrust claims premised on such a conspiracy is proper, and that where no allegation of injury to competition, as compared to injury to a competitor, exists, that dismissal of an antitrust claim is proper. Neither of these circumstances exist here.

3. CERTIORARI SHOULD BE DENIED TO EXAMINE THE SECTION 2 FINDINGS OF THE NINTH CIRCUIT AS THIS CASE CLEARLY INVOLVES PREDATORY CONDUCT AND IS NOT IN CONFLICT WITH ANY OTHER CIRCUITS

The Court of Appeals opinion regarding the Sherman Act, Section 2 claim was premised upon its finding that under the facts alleged Western had satisfied the pleading requirements and particularly the predatory conduct element of the claims. See opinion at App. p. 10. In defining predatory conduct, the Court of Appeals quoted from its decision in *William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*, 668 F2d 1014, 1030-31 (9th Cir. 1981), *cert. denied* 103 S.Ct. 57 (1982) wherein such conduct was labelled as "not true competition . . . its purpose is to create a monopoly by means other than fair competition."

The conduct alleged by Western satisfied the latter requirement, and specifically established the anticompetitive character of defendant's conduct. An allegation of predatory pricing, i.e. below unit or variable cost, is *not*

necessary for pleading a violation of Section 2 of the Sherman Act for attempt to monopolize or for actual monopolization or conspiracy to monopolize. Rather, predatory pricing, where appropriate, is but one form of recognized predatory or anticompetitive conduct which satisfies the conduct requirement of properly pleading a claim under Section 2 of the Sherman Act. *See e.g. William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*, 668 F.2d 1014, 1030-31 (9th Cir. 1981); *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227, 230 (1st Cir. 1983) (a case cited by petitioners); *Arthur S. Langenderfer, Inc. v. S. E. Johnson Co.*, 729 F.2d 1050, 1055 (6th Cir. 1984) (a case cited by petitioners); *International Air Industries, Inc. v. American Excelsior Co.*, 517 F.2d 714, 722-23 (5th Cir. 1975); *D&S Redi-Mix v. Sierra Redi-Mix & Contracting Co.*, 692 F.2d 1245, 1247 (9th Cir. 1982).

In the instant case, the Court of Appeals in determining that the allegations of the plaintiff were adequate to support a claim under Section 2 of the Sherman Act viewed the particular factual setting in arriving at its conclusion that as alleged the facts showed anticompetitive or predatory conduct.

Defendants' petition attempts to improperly assume that the claims involved are predatory pricing claims and totally neglects the fact that *the necessary allegations are for predatory conduct* which can be satisfied by a number of various activities *only one of which may be predatory pricing* in the more classic sense.

It is clear that the instant case is not a proper means by which to reconsider the Transamerica decision as this

decision is not the basis upon which the Court of Appeals ruled with respect to Western's Section 2 claims. Rather, the factual setting of that case is as different from the instant case as are all the proposed conflicting decisions of the other circuits set forth by defendants. Whether sales below cost occurred or did not occur is not the issue, as the conduct alleged to have been involved is predatory in either case. Defendants' constant preoccupation with "predatory pricing" has resulted in their restricted vision of what was simply and straightforwardly pleaded as predatory conduct.

While this case *is not a classic predatory pricing case,* the economic results are exactly the same as if predatory pricing occurred due to the unusual factual situation. The common bane of predatory pricing and this case is the exclusion of competitors not based upon any economic efficiency or other business acumen with the intended result of monopolizing the business and extracting monopoly profits. Such activity is *not* procompetitive, but inherently anticompetitive. This is exactly what the Court of Appeals determined.

Even assuming arguendo that the antidumping laws are protectionist, circumvention by one competitor does not create competition, but rather results in exclusion of the other law abiding competitors, by unlawful means. Congress could not have intended that to remain in competition you would have to break one of its laws.

The cases cited as conflicting with the instant decision set forth exactly the same economic considerations as above even though they were described as predatory pricing cases. For example, as is set forth in *Barry*

Wright Corporation v. ITT Grinnell Corp., 724 F.2d 227 (1st Cir. 1983), the exclusionary conduct definition is precisely the conduct alleged in the instant case.

Petitioners fail to address the factual distinctions between the "conflicting" cases cited and the instant case, rather relying on the Transamerica facts to establish similarity of cases. This comparison is inappropriate for deciding whether certiorari should be granted in the instant case. Moreover, petitioners, while failing first to consider that predatory conduct is all that is legally necessary, then ignore the facts and treat the law in a vacuum. When comparing cases in making a claim that a conflict in the circuits exist, *reference to the facts is crucial,* otherwise a meaningless comparison between apples and oranges occurs, as here.

Petitioners urge that under the standards now set forth by the Court of Appeals administration of the Section 2 claim is unworkable as a potential defendant cannot tell whether his sales will result in liability or not. This claim is clearly specious in the instant case. *This is not the Transamerica case, this is the Western Concrete case.* Here, as alleged, defendants imported steel at prices *below* a set governmental price, fraudulently doctored papers to show that it was above this set price and, then when caught, paid countervailing duties on this set price and various criminal fines. *Defendants knew exactly the cut-off price between legal and illegal conduct.* Such a number is easy to administer. Consequently, this conduct coupled with its underbidding tactics all in furtherance of its intent to exclude competitors is no more difficult to administer than any other Section 2 claim.

V.

CONCLUSION

In view of the inappropriate characterization of the instant matter as a predatory pricing case by petitioners, the clear predatory conduct alleged by Western, the anticompetitive effects of defendants' conduct, the ease of administration of determining whether illegal conduct is involved and the non-conflict of this case with other circuits, it is clear that this case is not proper for granting a writ of certiorari.

Respectfully submitted,

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